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## ARTICLES

### ITEM VETO WITHOUT A GLOBAL SPENDING LIMIT: LOCKING THE TREASURY AFTER THE DOLLARS HAVE FLED

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The budgetary process frequently shapes public policy. Whether current events lead to maintaining the existing budgetary process or to radically changing the way we allocate resources, therefore, may determine the future course of public policy. Two completely opposite changes in the budgetary process are currently being debated: an item veto and a global spending limit. The item veto would allow presidents to veto discrete parts of single bills. It would give presidents more formal power on the supposition that they would use it to lower spending. A global spending limit, however, would fix the total amount that could be spent in a given year by restricting outlays to the prior year's amount, plus or minus the proportionate increase or decrease in the GNP. This would alter the rules of the budgetary game from one of adding proposals together to one of subtracting: more for some programs would result in less for others. Thirty-two states have already passed resolutions calling for a constitutional convention on a balanced budget-spending limit amendment;<sup>1</sup> within a few months the magic number of 34 (two-thirds of the states) may be reached, and the budgetary process will be taken out of congressional hands.

The item veto, although superficially attractive, would not effectively cut spending; instead, it would further weaken the budgetary process. Empowering presidents to strike down congressional spending they believe excessive is merely a reactive budget control, which would make Congress more irresponsible rather than less, encourage log-rolling and drastically alter the separation of powers.

Establishing a global spending limit, on the other hand,

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1. See Rackoff, *The Monster Approaching the Capital: The Effort to Write Economic Policy into the United States Constitution*, 15 AKRON L. REV. 733 (1982).

would put the responsibility to control spending in the hands of the legislators. If expenditures could not increase faster than the growth of the gross national product, then big increases in some programs would require decreases in others. Incentives would be created for spenders to limit each other, and it would become worthwhile to sacrifice because everyone else would have to stay within the limits.

In what follows, I outline the weaknesses in the item veto and analyze the states' experience with it. In conclusion, I propose a global spending limit as an anticipatory budget mechanism that would effectively control spending at its source, the legislature, and would avert the problems that the item veto would create.

### I. A LITTLE TOOL FOR A BIG JOB: THE LINE-ITEM VETO

As the 1984 election campaign demonstrated, most Republicans, facing the unpleasant task of explaining away historically unprecedented deficits, being unwilling to talk of raising taxes and unable to reduce domestic spending, understandably spoke favorably of the line-item veto. So long as most Democrats resisted, blame for continuing deficits could be placed on them. Focusing entirely on the immediate future, Republicans may well indulge themselves in fantasies of their leader cutting and slashing, slashing and cutting, until big government is vetoed out root and branch. However that is all it is, a fantasy.

It does not take much imagination to realize that presidents other than Ronald Reagan may occupy the White House. Would someone with different economic priorities use the item veto to increase defense and decrease domestic spending or might it be the other way around? Might a president interested in increasing domestic spending hold defense spending ransom to achieve that purpose? Whereas spending limits bind presidents no matter who they are or what their spending proclivities, the effectiveness of the item veto in reducing overall spending depends on a particular personality and political persuasion.

Granting proponents of the item veto the best of their possible worlds, their President in the White House ready to throttle the expenditure machine, does not rescue the item veto from the charge of inappropriateness. President Reagan does not wish to cut defense, which amounts to around 28

percent of the budget.<sup>2</sup> He has, without the item veto, helped reduce means-tested entitlements;<sup>3</sup> he has been unable or unwilling to cut the big-ticket universal entitlements, especially social security,<sup>4</sup> because they have widespread support. Together these social welfare programs amount to about 47 percent of the budget.<sup>5</sup> Allowing approximately 12 percent for interest on the national debt,<sup>6</sup> only a small 13 percent devoted to general government would be subject to the item veto.

But even much of the 13 percent allocated to government will prove precarious to the item veto. First, there is misadventure. By attempting to outguess markets (they were supposed to go "this-a-way" and instead they went "that-a-way"), or by engaging in economic fine tuning (trying to adjust supply and demand ever so slightly but, as usual, it ended up adjusting them), the government has paid billions of dollars more in agricultural subsidies<sup>7</sup> than the Democrats would have dared to do for fear of being branded profligate.

Second, there is politics. Perhaps the President's people think he will use the item veto to eliminate or reduce politically important expenditures on which there has long been a negative professional consensus. I refer to agricultural<sup>8</sup> and maritime subsidies,<sup>9</sup> sub-market prices for grazing rights on federal land,<sup>10</sup> water for irrigation in the west,<sup>11</sup> all sorts of river and harbor projects,<sup>12</sup> and the like. Before I believe that presidents will kill these "sacred cows" with an item veto, I want to see these same presidents do something already in their power: appoint officials who will oppose these programs. Whether an item veto would be effective, assuming a congressional initiative to restore funding, is problematic but doubtful. In any event, although tempting targets

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2. See EXEC. OFF. OF THE PRESIDENT, OFF. OF MGMT. AND BUDGET IN BRIEF, F.Y. 1984, at 23 (1983).

3. *Id.*

4. *Id.*

5. *Id.*

6. EXEC. OFF. OF THE PRESIDENT, OFF. OF MGMT. AND BUDGET, SPECIAL ANALYSIS: BUDGET OF THE U.S. GOV'T., FY 1984, at E-11 (1983).

7. Collins & O'Shea, *Stockman: Subsidies Bloat Budget*, Chicago Tribune, Feb. 6, 1985 at 1, 9.

8. See 130 CONG. REC. E1210 (daily ed. Mar. 22, 1984), and 130 CONG. REC. S1097-99 (daily ed. Feb. 7, 1984).

9. See 129 CONG. REC. S10023-26 (daily ed. July 14, 1983).

10. See 129 CONG. REC. H4555-56 (daily ed. June 28, 1983).

11. See 130 CONG. REC. H1738-58 (daily ed. Mar. 20, 1984).

12. See 130 CONG. REC. 53479-80 (daily ed. Mar. 29, 1984).

could be eliminated, cuts in thirteen percent of the federal budget, which has already been severely pruned, will not make a big difference.

Third, there is misconception. The item veto does not address the widespread will to spend. Rather it conveys the image of presidents valiantly trying to stem the tide of spending but, for want of this one weapon, being overwhelmed by hordes of congressional spenders. There is no truth in this. Presidents have been in the forefront of spending. In this respect, think not only of Democrat Lyndon Johnson but of Republican Richard Nixon, in whose administration, in service of his vaunted flexibility, huge increases in social security,<sup>13</sup> loan guarantees,<sup>14</sup> and housing expenditures<sup>15</sup> took place. More than this micro-error about presidents, however, macro-mistakes about political systems in general and American politics in particular lie behind this misconception about the item veto. First the general, then the particular.

The general case against the sufficiency of the item veto is overwhelming. Line up the world leaders in public expenditure as a proportion of GNP among democracies: in all of them, cabinets have the power to determine the entire spending budget, item by item, line by line.<sup>16</sup> These governments do not need an item veto because nothing gets into the budget without their approval. Nonetheless their budgets grow. Part of the reason (in some but not all these spending leaders) is that they have coalition governments in which the cost of consent is side payments to partners which increase the size of the budget. To the extent that the United States shares this characteristic of divided government, either because the presidency and all or part of Congress are held by different parties or because, though ostensibly of the same party, their policy preferences differ, there is no reason to believe the item veto will do what total formal control of the budget cannot. Insofar as governments controlled by a single party, such as Sweden and Norway,<sup>17</sup> are concerned, even

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13. See Table 2, *Budget Receipts by Source and Outlays by Function 1971-1981*, in EXEC. OFF. OF THE PRESIDENT, OFF. OF MGMT. AND BUDGET, THE U.S. BUDGET IN BRIEF, F.Y. 1981, at 71 (1980).

14. *Id.*

15. *Id.*

16. See A. WILDAVSKY, *BUDGETING: A COMPARATIVE THEORY OF BUDGETARY PROCESSES* (1975).

17. Tarschys, *Curbing Public Expenditures: A Survey of Current Trends*, paper prepared for the Joint Activity on Public Management Improvement of the OECD (Technical Co.-Operation Service), April 1982.

unity of command is not equal to the task.

It is not that most of these governments do not have periodic budget cutting drives but that these campaigns are never successful.<sup>18</sup> Hence the essential nature of the problem is clarified: lack of governmental desire and/or self-control. Governments must (a) want to reduce spending, and (b) have an effective technology for doing so.

Considering the United States by itself, there is a good chance that the item veto, instead of merely being limited or ineffective, would be positively counterproductive. Understanding why this might happen requires a brief excursion into the separation of powers. In the United States, the legislative function is shared between Congress and the President. Presidents may veto proposed legislation<sup>19</sup> and Congress may pass it into law by a two-thirds vote.<sup>20</sup> With the item veto, what is not stated, because it is taken for granted, is that Congress may act and not act, in other words, pass a law and not take responsibility for it. Then the branches of government really would not be separated, one responsible within its sphere, cooperating when possible, conflicting when necessary, joined together. For then, with an item veto, a president could pick and choose among parts of legislation, fashioning a law essentially his own.

Voting on the understanding that a bill may become a law is not the same as voting with the expectation that part of the proposal will be taken out even though the rest will remain. Acting under the first expectation, a legislator has to act as if the bill might become a law for which he or she would be responsible. Acting under the second expectation, a legislator may put in provisions believing that the President has to take responsibility either by vetoing or signing the legislation. Placing a suggested menu before the ultimate decider, knowing he can pick and choose, is not the same as believing one is among the last decision makers. The responsibility of the President has been clarified and strengthened with the item veto: he is responsible for every part of an appropriation or a law he does not veto. Whereas before he had to judge whether to accept or reject the bill as a whole, he would now pick and choose. Thus the old excuse that the President did not want a particular appropriation but had to accept it as part of a package would no longer be acceptable.

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18. *Id.*

19. U.S. CONST. art. I, §7, cl. 2.

20. *Id.*

Instead of putting the onus on Congress to moderate its expenditure proposals, the item veto, by giving presidents more formal power, would place the onus on them.

By weakening its formal powers, the item veto would make Congress more irresponsible. Congress, considered as an institution, will have less reason than ever to consider the collective consequences of its acts. If the President can veto every item proposing spending of which he does not approve, why not just throw in whatever is at hand, leaving it to the President to get rid of the worst? Certainly, the efforts of a congressman to argue with constituents that a particular item is of low priority (every bit of spending helps somebody, or so they think, or they would not want it) is gravely weakened by the retort: let the President worry about that. With proposals for spending becoming entirely a sign of good will, rather than of collective responsibility, who will refuse? How helping Congress avoid responsibility will reduce the growth of spending is not self-evident.

In short, why risk upsetting the separation of powers for losses that might be large while gains, if any, can only be small? No one needs more policies that promise far more than they can possibly deliver.

The item veto would certainly interfere with the normal practice of logrolling in Congress. As a perceptive congressman put it,

Where Congress has appropriated for A and for B, Congress means to say that it gives to each, conditioned upon the gift to the other, and that it gives to neither unless it gives to both . . . . The new veto power proposed would give the President the right by the veto of one and the approval of the other, to exercise the function of giving to one an appropriation independent of the other, when Congress has only given it conditioned [on] the appropriation to the other.<sup>21</sup>

If presidents could prevent bargains from being struck, how would the characteristic congressional process of logrolling be affected by the item veto? In logrolling, the legislation's passage depends on broadly spreading the benefits. Suppose A and B agree to support each other to facilitate passage of both their proposals. If A gets a project but B does not because of the line item veto, then A's project is also in jeopardy. At first blush, it appears that by withdrawing a log

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21. H.R. Res. 1879, 49th Cong., 1st Sess. (1886).

(or logs) from the roll, there will be fewer agreements and hence lower spending. Therefore, the item veto will reduce spending.

Or will it? A linear argument leads to a one-way result. Bringing in the effects of interaction suggests the opposite conclusion that an item veto will actually increase logrolling. Congress is a highly interactive and tightly linked system. Alter one element and the others are also likely to change. Currently, congressmen have some incentive to create minimum winning coalitions because giving too much to too many might either have adverse overall effects or collapse of its own weight. Consequently, bargains are renegotiated at lower levels for each participant. But if Congress is faced with the perpetual problem of overriding vetoes, the nature of incentives will favor much larger (and, therefore, aggregatively more expensive) logrolls. The ultimate size of unrepentant logrolling, the making of bargains that cumulate into larger and larger aggregates, cannot be reduced by diminishing the number of small bargains because that only increases the incentive to make bigger bargains.

What is necessary, rather, is to begin at the end: to start by fixing the total permissible size of all bargains so that whatever the roll of the expenditure logs, they must fit within a pre-existing size. Logrolls would compete with each other, thereby ending their upward spiral.

According to Lord Bryce, the item veto is one of those practices that "is desired by enlightened opinion."<sup>22</sup> Presumably, the item veto would help take the curse of divided authority off the American separation of powers by lending it a bit of the aura of the parliamentary system. The executive would be strengthened (doubly so in Bryce's day, since at the end of the 19th century the executive budget was not yet a reality)<sup>23</sup> and responsibility would be more clearly identified and located in a centralized place. Indeed, the origin of the item veto in the United States lies in the Constitution of the Confederate States.<sup>24</sup> There and then, the rationale was avowedly to bring in some of the advantages of the British way. As we know, this hypothesis was never tested because

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22. BRYCE, *quoted in* Comment, *The Item Veto in the American Constitutional System*, 25 GEO. L.J. 113 (1936).

23. C. WEBBER & A. WILDAVSKY, *Balanced Regimes, Balanced Budgets: Why America Was So Different*, in *A HISTORY OF TAXATION AND EXPENDITURE IN THE WESTERN WORLD*, VII (forthcoming 1986).

24. CONFEDERATE CONST. art I, §7, cl. 1 (Permanent).



the political system in which it was embedded was overthrown by force.

## II. STATE EXPERIENCE WITH THE ITEM VETO

The argument for the item veto rests on a combination of two factors: alleged budgetary cuts in states having the item veto, together with a version of the marginal fallacy.<sup>25</sup> On the surface it does appear that under certain governors in some states, such as Ronald Reagan in California,<sup>26</sup> the item veto eliminated one or two percent of spending, which, if cumulated over several years, adds up to significant reductions. I say "alleged" savings because it is well-known that legislators pad their requests in anticipation of vetoes. Cumulating cuts may be illusory if it is the same padded sums that get eliminated. The marginal fallacy lies in the assumption that whatever small proportion of the total that occupies one's attention will make the critical difference in, say, reducing the deficit. The assumption that all others will be unaffected is frequently fallacious. The claim for cumulative cuts is reminiscent of the idea that if every Chinese person spent a cent buying our products, we would be rich.

If the states are indeed a laboratory, no political scientists in recent times have considered the consequences in the 43 states that employ a version of the item veto. There are no comparative studies of the post-1960 experience. Did these exist, it might be possible to say more about conditions of effectiveness. Would the item veto have similar consequences, for instance, in the presence or absence of a balanced budget requirement? As things stand, nothing helpful like this is possible. All I can do is bring in a few tidbits, gleaned from studies of individual states, relevant to the major arguments about the item veto.

Apparently, it is possible to interweave items so that they are not separable, thereby nullifying the intent of the item veto. At least, Roy D. Morey, writing about Arizona, says that:

A major reason why the governor has not used the item veto more frequently is that the legislature has deliberately constructed appropriation bills in such a way as to stymie its

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25. See Wildavsky, *The Intelligent Citizen's Guide to the Abuses of Statistics*, 1 POL. & SOC. LIFE 825 (1963).

26. Caiden & Chapman, *Constraint and Uncertainty: Budgeting in California*, 2 PUB. BUDGETING & FIN. 111 (1982).

use. Those items which the legislature feels have questionable gubernatorial support are rearranged or lumped with those items the governor is forced, either by conviction or necessity, to approve."<sup>27</sup>

For this reason, he concludes "[the] device has proved to be of little value to Arizona governors."<sup>28</sup> It appears that the item veto is more powerful in Pennsylvania where governors use it a good deal. But this conclusion has to be modified by interaction effects: "When a legislator, even though opposed in principle to an appropriation, is reasonably certain that the governor will slice it down to more moderate size," M. Nelson McGeary states in his study of Pennsylvania, "he is tempted to bolster himself politically by voting large sums of money to a popular cause."<sup>29</sup> Some idea of the extent of irresponsibility may be gained by noting that a bill to amend the milk control law in 1940, which passed the state house by 200 to 0, was sustained over a veto, 115 yes to 75 no.<sup>30</sup> And when, in 1941, the two houses of the legislature could not agree on the budget, they sent it to the governor for final disposition.<sup>31</sup> Where there is no item veto, as in North Carolina, Coleman B. Ransone, Jr. reports that "the legislature seems to have developed some sense of responsibility; there can be no buck-passing of undesirable legislation to the governor with the knowledge that he will veto the bill in question and thus take the burden from the legislature."<sup>32</sup>

The item veto does not qualify as an effective instrument of spending control because it locks the doors of the treasury after the spending bids have already been proposed. The trick is to prevent the presentation of excessive expenditure demands, not to engage in the futile task of rejecting a small proportion after they have been made. Prevention is preferable to cure. This is not unique to budgeting, for the same is true of crime and of health.

Just as criminals must be deterred before crimes are committed, spending agencies must be persuaded to limit their demands at the source. When the doctrine of the bal-

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27. Morey, *The Executive Veto in Arizona: Its Use and Limitations*, 19 W. POL. Q. 512 (1966).

28. *Id.* at 515.

29. McGeary, *The Governor's Veto in Pennsylvania*, 41 AM. POL. SCI. 943 (1947).

30. *Id.* at 945-46.

31. *Id.*

32. C. RANSONE, JR., *THE AMERICAN GOVERNORSHIP* 159 (1982).

anced budget was in vogue, for instance, so that existing levels of taxation, plus or minus an increment, provided a global total beyond which spending would not be permitted to go, the spending departments were enmeshed in mutual understandings. If one department went beyond its fair share of allowable increases, others would have to make up the difference. Thus all had an interest in keeping each within bounds. No longer. Once participants in the budgetary process believe that it is desirable to ask for more or that end runs around the process (loans, guarantees, entitlements, regulations) pay off, the game is lost. No central controller has the time to examine so many programs or has the capacity to understand them. Where information is a prerequisite of control, the numerous people on the ground are bound to prevail over the few who are far away.<sup>33</sup>

Where the desire exists to keep public spending from growing faster than the economy but is prevented from manifesting itself due to an institutional bias (as may be true in the United States), controlling expenditure through global spending limits has merit. Where governments spend increasing proportions of GNP because that is what their elites and their citizens want, they will not fix spending because they believe it is not broken. Under such conditions, the item veto is irrelevant because the idea is to include expenditures, not exclude them.

Why, then, take a chance on a spending limit, which, because it is more powerful, is even less likely to become public policy than the item veto? My concern about the veto is that congressmen, tired of taking the heat for spending, may take this opportunity to pass it on to presidents, with the unfortunate consequences described here. I recommend the institution of a spending limit because, once enacted, it could do the job for which it is advertised, namely, stop government from growing faster than the economy. In the end, it all boils down to this: a spending limit is aimed at reconciling desire for lower totals with support for programs; by changing the rules to bring the parts into a mutually supportive relationship with the whole, global limits aim at the cause of higher spending. The item veto does not.

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33. See A. WILDAVSKY, *The Transformation of Budgetary Norms*, in *THE POLITICS OF THE BUDGETARY PROCESS*, XV (4th ed. 1983).

### III. THE ITEM VETO WITH A GLOBAL SPENDING LIMIT

Without a global spending limit, I have argued, a line-item veto would be both weak and perverse. It would be weak because the veto would apply only to a small proportion of the budget that is either already under severe attack, like general government, or has so far proved politically invulnerable, like social security. It would be perverse because pro-expenditure presidents could use the veto (or, more accurately, the threat of the veto) to increase total spending, and because legislators could (and some would) use the existence of a veto to increase spending bids since presidents could always veto them if they were unsound. Thus a measure designed to reduce spending and increase responsibility for budgetary totals would likely have exactly the opposite effects: increasing irresponsibility as well as the size of the budget.

Consider, however, how a line item veto might work in the presence, rather than the absence, of a global spending limit. Let us suppose that by congressional or constitutional action, budget outlays for any year could not exceed the prior year's totals times the percentage increase in GNP. Everyone would know that for a specific year, spending could not exceed a given sum. Let us suppose, further, that the usual incentives operated to push spending up to this global limit. No doubt, such a situation would reduce the demand for an item veto because the end in view, i.e., control over spending, had been achieved by far more stringent and effective means. Nevertheless, it will be instructive to consider how the veto would work under these much altered circumstances.

Presidents so disposed could not use the threat of vetoing an item desired by many in Congress simply to increase an item the executive preferred. If more for one item means less for another (recall that everyone is operating at the margin of the global limit), presidents would have to accompany substantial increases with substantial cuts. The budget could go down but not up.

Nor would congressional spenders be disposed to pad old items or throw in new ones on the supposition that presidents would be responsible for vetoing them. Under the new rules imposed by a global spending limit, Congress could not exceed the global total. Congress itself would have to cut some items to make up for increases in others. This is what I understand as taking responsibility for the consequences of

one's own actions. If Congress proposed a budget exceeding the limit, presidents could use their veto to cut at will, a process that would put Congress in the weakest possible position.

With a limit in place, therefore, the item veto would be restricted to two uses: (1) reducing the size of the budget below the global total, or (2) enhancing the bargaining power of presidents vis-a-vis a majority of Congress on which items should be included in the budget at what level. Assuming that presidents, over a range of vetoes, have reasonable prospects of support from a little over one-third of the House or Senate to prevent any two-thirds override of the veto, they can eliminate (or, in prior bargaining, reduce the amount of) spending items in dispute. Perhaps the threat of a veto would sufficiently enhance items presidents prefer marginally over those desired by an ordinary majority of Congress. Perhaps Congress, mindful of being at a disadvantage, would word items to make them difficult to veto. In any event, we see that under a global limit the item veto would actually work in the ways its sponsors desire by sometimes decreasing but never increasing the size of the budget and by giving presidents greater power to make marginal adjustments in the budget. Whether their spending preferences would, on balance, be furthered by presidents or Congresses is up to each reader to decide.

The key to controlling spending, if that is what is desired, lies in a global spending limit, not in a line-item veto. Without a global limit, the item veto would likely boomerang, leading to greater political irresponsibility and higher spending. With global limit, the item veto might lead to marginal decreases in spending and achieve the purpose for which it was proposed.